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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

MARSHA ELLIS, as Trustee, etc., Plaintiff, Cross-defendant and Respondent, v. ROBERT BECK et al., Defendants, Cross-complainants and Appellants.	E060002 (Super.Ct.No. CIVDS917110) OPINION

APPEAL from the Superior Court of San Bernardino County. John M. Pacheco, Judge. Affirmed.

Law Offices of Kimberly J. Laliberte and Kimberly J. Laliberte for Defendants, Cross-complainants and Appellants.

Fidelity National Law Group and Raymond Perez, Jr. for Plaintiff, Cross-defendant and Respondent.

I

INTRODUCTION

Two adjacent property owners, Marsha Ellis[1] and Robert Beck and Sally Beck, sued one another regarding a recorded easement located on the Beck property and granting road and utility access to two vacant lots owned by Ellis. After a court trial, the court entered judgment against the Becks who now appeal. Applying a deferential standard of review, we hold the recorded easement is not extinguished. We affirm the judgment.

II

FACTUAL AND PROCEDURAL BACKGROUND[2]

A. Undisputed Facts

Ellis and the Becks are neighbors at 225 Edgemont Drive and 221 Edgemont Drive, respectively, in Redlands. Ellis owns three lots—a residential lot, west of the Beck property, and two vacant lots, parcels 6 and 7, situated south and southwest of the Beck property. A steep canyon separates the Ellis residence from parcels 6 and 7, affecting access from the residential lot. The Krick property is east of the Beck property.

The Beck residence was built in 1951. In 1967, a 20-foot-wide easement—running north and south along the eastern border of the Beck property—was recorded,

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[1] Marsha Ellis, trustee of the Dale and Marsha Ellis Family Trust, dated November 28, 2005.

[2] Many pages of the reporter's transcript involve testimony about exhibits which are not clearly identified. Many of the exhibits referenced are not even part of the appellate record.

providing road and utility access to the two vacant lots. Experts for both parties discussed that the easement was narrower than 20 feet and eroded at the southern end. A portion of the Beck residence, some concrete steps leading to an entry, extends about four feet into the recorded easement.

The Becks purchased the property in 1976. Between 1980 and 1985, the Becks had engaged in litigation with previous owners of parcels 6 and 7 regarding the easement but the case was dismissed without a resolution of the dispute.

The Ellises purchased the three properties in 1997 and 1998. In 2008, the Ellises asked the Becks to agree to build a driveway on the easement, providing access to the vacant lots.

In December 2009, Ellis sued the Becks for quiet title and other causes of action, seeking a judicial declaration regarding the easement. The Becks filed a cross-complaint to extinguish the easement.

B. Ellis's Evidence

At trial in 2013, Marsha Ellis testified that she and her husband bought the vacant lots in 1998 for investment purposes and to protect their view. At the time of the purchase, Robert Beck showed Marsha exactly where the easement was located. Marsha discussed with the Becks that they could continue to make use of the property subject to the easement. The southern end of the easement had a "no trespassing" sign and a four-foot wooden gate, which had been erected to discourage trespassers but not to prohibit access from the north by the Ellises. A utility shed was located on nine or 10 feet of the easement. A corner of the Beck house extended about four feet onto the easement.

Cactus, trees, and shrubs also grew on the easement.

The Ellis family occasionally used the easement to visit the vacant lots for recreational purposes like walking, playing, and flying kites. In 2007 or 2008, there was a fire in the vicinity and the fire trucks used the northern part of the easement

In May 2008, the Ellises and the Kricks, the neighbors east of the Becks, approached the Becks about removing the utility shed and constructing a driveway on the combined easements between the Beck and the Krick properties. As part of the driveway proposal, the Ellises conducted a survey of the easement. The Becks objected to the proposed driveway.

Carson Storer, a land surveyor, testified that he surveyed the subject easement in 2004. The corner of the Beck house and the utility shed encroached on the easement. The slope between the Ellis residence and the vacant lots was too steep to be traversed by foot or vehicle. Storer agreed it was theoretically possible there could be some access to the vacant lots other than by the easement.

An engineer, Melvin Thatcher, testified a bridge from the Ellis residential property to the vacant lots would not be feasible for economic or environmental reasons. The proposed driveway was designed to be 20 feet wide along the Beck and Krick's common property line and would serve the vacant lots and the property of another neighbor, Suman. The driveway would require a variance to accommodate the four-foot encroachment by the Beck residence.

C. The Becks' Evidence

Sally Beck testified the easement did not appear to be in use when they bought the

property in 1976, or later in 1980. In 1980, Brace, the owner of parcel 7, proposed building a house and the Becks objected. After Brace tried to grade the easement with a tractor, the Becks filed a complaint to extinguish the easement against Brace and Starkey, the owner of parcel 6. The case was dismissed in 1985.

Sally Beck believed the purpose of the locked gate, constructed at the southern end, was to extinguish the easement. The concrete steps of the Beck residence extend into the easement. The Becks park their cars on part of the easement. The Becks planted trees and cactus on the easement. There are plantings and heavy brush all along the easement. Sally did not observe any use of the easement from 1985 to 1998. Sally never saw the Ellises use the easement.

Robert Beck testified he knew about the recorded easement for road and utility purposes when he purchased the property in 1976. The concrete steps were already in place in 1976. The shed was constructed in 1983 during the property litigation. The easement was overgrown with trees, cactus, and other vegetation. Robert agreed the purpose of the gate was to discourage intruders and trespassers, not the Ellises. Robert did not see anyone, including fire trucks, use the easement.

The Becks understood the Ellises wanted to build a joint driveway using the easement on the Beck and Krick properties but the Becks objected because they believed the easement had been extinguished. Robert told Marsha Ellis she could not use the easement for access to the vacant lots because it had been extinguished.

D. Statement of Decision

In its statement of decision, the court found an express recorded easement for road

and utility purposes existed on the Beck property in 1976. The Becks knew about the easement when they purchased the property. In 1998, the Becks showed the Ellises the easement but the Ellises were not told until 2008 they could not use the easement. The easement was not extinguished because it was used by the Ellises from 1998 to 2008. The Becks did not establish their hostile use of the easement. The easement is the only natural, feasible, and legal means of access to the vacant lots. At the expense of the Ellises, the Becks were ordered to remove any encroachments interfering with road and utility uses.

III

DISCUSSION

The standard of review favors the judgment. The Court of Appeal "views the evidence in a light most favorable to the respondent" and "factual matters will be viewed most favorably to the prevailing party . . . 'giving him the benefit of *every reasonable inference*, and *resolving conflicts* in support of the judgment.'" (*Orange County Employees Assn. v. County of Orange* (1988) 205 Cal.App.3d 1289, 1293; *Yield Dynamics, Inc. v. TEA Systems Corp.* (2007) 154 Cal.App.4th 547, 556-557.) "The substantial evidence standard applies to both express and implied findings of fact made by the superior court in its statement of decision rendered after a nonjury trial." (*SFPP v. Burlington Northern & Santa Fe Ry. Co.* (2004) 121 Cal.App.4th 452, 462.)

An express easement is a vested interest in real property. The holder of an easement has a right to use the property. (*Golden West Baseball Co. v. City of Anaheim* (1994) 25 Cal.App.4th 11, 35; Civ. Code, § 801.) By statute: "The land to which an

easement is attached is called the dominant tenement; the land upon which a burden or servitude is laid is called the servient tenement." (Civ. Code, § 803.)

The Becks did not adequately prove any of the four statutory methods for extinguishing an easement. (Civ. Code, § 811.) This is not a case involving the first two methods, which are merger or destruction of the servient tenement. To the extent the Becks rely on the other methods involving incompatible acts, including adverse possession, or abandonment by the easement owner, sufficient evidence supported the trial court's findings.

The Becks argue the easement was extinguished by adverse possession after 1985 when the lawsuit was dismissed against the former owners of lots 6 and 7. An easement may be terminated by adverse possession if the servient owner occupies the easement in an open and notorious manner and uses it under a claim of right that is hostile and adverse to the owner of the easement for a five-year period. (*Tract Development Services, Inc. v. Kepler* (1988) 199 Cal.App.3d 1374, 1386; *Masin v. La Marche* (1982) 136 Cal.App.3d 687, 693-695.) Many cases have held "whether the various elements of adverse possession have been established constitute questions of fact." (*Masin*, at p. 693.) "'On appeal, when the evidence is contradictory, conflicting interpretations are presented thereby, or conflicting inferences may be drawn therefrom, that which favors the judgment must be accepted as true, and that which is unfavorable must be discarded as not having had sufficient verity for acceptance by the trial court.' (*Ross v. Lawrence* (1963) 219 Cal.App.2d 229, 232." (*Sevier v. Locher* (1990) 222 Cal.App.3d 1082, 1087.)

The Becks rely on the *Masin* case in which the servient tenement erected a wooden barrier across an easement, stored a trailer, and allowed shrubbery to grow to prevent access. The appellate court found there was sufficient evidence "to sustain the trial court's finding that the access easement across defendants' property was extinguished by adverse possession." (*Masin v. La Marche , supra,* 136 Cal.App.3d at p. 695.)

However, other cases have held that, where the easement was fenced and cultivated by the owner of the servient tenement, the trial court may conclude as a question of fact that the possession was not adverse and hostile to the rights of the owner of the dominant tenement. (*Clark v. Redlich* (1957) 147 Cal.App.2d 500, 507.) Use of an easement for parking was also not adverse possession by the servient tenement. (*Zimmer v. Dykstra* (1974) 39 Cal.App.3d 422, 435-437.)

Here the trial court found the Becks knew about the recorded easement which existed when they bought the property. The trial court credited Marsha Ellis's testimony that the Becks acknowledged the easement in 1998 and did not object to its use until 2008. Furthermore, the Ellises made limited use of the easement from 1998 to 2008. Therefore, the Becks did not establish their hostile use of the easement. We hold there was sufficient evidence to sustain the trial court's finding that the easement across the Beck property was not extinguished by adverse possession. (*Masin v. La Marche, supra,* 136 Cal.App.3d at p. 695.)

The Becks also did not prove abandonment. An easement cannot be lost or terminated by mere nonuse, however long it may continue. The evidence must show an

intent to abandon all present and future use of the easement. Also, the owner must intend, either expressly or impliedly, to abandon the easement by some unequivocal or decisive act that shows an intent to abandon. (*Glatts v. Henson* (1948) 31 Cal.2d 368, 371; *Masin v. La Marche, supra,* 136 Cal.App.3d at p. 693; *Clark v. Redlich, supra,* 147 Cal.App.2d at p. 507.)

Intent to abandon is generally a question of fact determined by conduct and the surrounding circumstances. (*Gerhard v. Stephens* (1968) 68 Cal.2d 864; see *Faus v. City of Los Angeles* (1967) 67 Cal.2d 350, 363; *Tract Development, supra,* 199 Cal.App.3d at p. 1386; *Buechner v. Jonas* (1964) 228 Cal.App.2d 127, 131-134; *Ocean Shore R. R. Co. v. Doelger* (1960) 179 Cal.App.2d 222, 236.) The burden of proving the owner's intent is on the person who claims that the easement has been terminated. (*Ward v. City of Monrovia* (1940) 16 Cal.2d 815, 820; *Weideman v. Staheli* (1948) 88 Cal.App.2d 613, 616.)

The fact that an easement has not been used for a long period of time is not conclusive of an intention to abandon it. (*Faus v. City of Los Angeles*, *supra*, 67 Cal.2d at p. 363.) When an easement is obstructed by the owner of the servient tenement, the trial court can conclude that there has not been an abandonment of the easement. (*Stufflebeem v. Adelsbach* (1901) 135 Cal. 221, 224; *Murray v. Fuller* (1947) 82 Cal.App.2d 400, 407.)

In *Strosnider v. Pomin* (1942) 52 Cal.App.2d 745, 746-750, an easement was granted for a private access road to the shores of Lake Tahoe but the road was never constructed or used. Six years later the owner of the servient tenement constructed

buildings that encroached on the easement, and 24 years after the grant of the easement the servient tenement owner constructed a road but prevented the owners of the dominant tenement from using it. The court concluded that there had been no intention by the various owners of the dominant tenement to abandon the easement, and it was not extinguished merely because it had not been improved or used.

It is not established in the record whether, in 1967 when the easement was granted, the concrete steps already encroached about four feet onto the easement. However, the encroachment by the steps was obvious in 1976 when the Becks bought the property. Although the Becks apparently tried to oppose use of the easement after 1976 by planting vegetation, by erecting a utility shed and a gate, and by suing the dominant tenement owners, there was no clear intention by any of the easement owners to abandon the easement. The evidence supports the trial court's opposite conclusion, that the various dominant tenement owners wanted to preserve the easement in spite of the Becks' vigorous efforts to extinguish it.

Notably, the Becks did not obtain a judicial determination in 1985 that the easement had been abandoned or extinguished. In the absence of any previous judicial finding about the easement, the Becks cannot now claim the easement was extinguished in 1985 or in the subsequent years.

The trial court found that, in 1967, an express easement was granted for road and utility purposes with the vacant lots as the dominant tenement and the Beck property as the servient tenement. The Becks knew about the easement when they bought their property in 1976. The easement still existed after 1985 until 1998 when the Ellises

bought the vacant lots. The easement was not extinguished between 1967 and 2009, when the Ellises filed their complaint.

Based on the circumstances, we hold the trial court's finding the recorded easement was not extinguished is amply supported by the evidence. Although the trial court also found the easement is necessary for the dominant tenement, we do not need to discuss prescriptive easements by necessity as an alternative ground for affirming the judgment.

IV

DISPOSITION

We affirm the judgment. Respondent Ellis shall recover costs on appeal.

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CODRINGTON
J.

We concur:

HOLLENHORST
Acting P. J.

McKINSTER
J.